1908.
October 6.

Present: Mr. Justice Wendt and Mr. Justice Grenier.

KULATUNGAM *v.* SABAPATHI PILLAI *et al.*

D. C., Batticaloa, 2,956.

Damage of property leased by fire—Accident—Burden of proof—Roman-Dutch Law.

Where property leased is destroyed or damaged by fire, while in the occupation of a lessee or tenant, the onus lies on the lessee or tenant to prove that it was due to accident and not to negligence.

Bastian Pillai v. Gabriel[1] followed.

THE plaintiff sued the defendants, who were tenants of a house belonging to him, for damages for the destruction of the house by fire while in the occupation of the defendants. The District Judge dismissed the plaintiff's action, on the ground that no negligence had been proved on the part of the defendants.

The plaintiff appealed.

Bawa, for the plaintiff, appellant.

Van Langenberg (with him *Balasingham*), for the defendants, respondents.

Cur. adv. vult.

October 6, 1908. WENDT J.—

The plaintiff seeks to recover damages for the destruction of his house by fire while in the occupation of the defendants, his tenants. There was no direct evidence as to the origin of the fire. "What appears to be the truth," says the District Judge, "is that a little girl (how little I cannot say, as the child has not been produced), a sister of the first defendant, was carrying some fire about for some reason or other, and the wind blew a spark on to the roof or the fence near the roof and set fire to it."

The issues framed were as follows:—

(1) Whether the second defendant acted so carelessly and negligently and without taking due and proper care and precaution as to let the fire of the kitchen burn down the house?

(2) What are the damages?

[1] *(1892) 1 S. C. R. 264.*

The plaintiff began in the Court below, but it was argued before us that the onus of exculpating themselves by showing that the fire was due to unavoidable accident lay upon the defendants. The question of onus was an important one, because I think it is clear from the learned District Judge's judgment that if in his view the burden of proof had laid upon defendants' shoulders, he would not have found in their favour as he has done. See in particular the passages beginning " If it had been shown that the fire was caused by neglect, " " There is nothing to show second defendant was aware. " The incidence of the onus in a case of destruction by fire appears to have been the subject of controversy among the old jurists. Grotius (*Introduction, Bk. III., chapter XIX., section 11; Maasdorp 395*, citing *the Digest, Bk. XIX, 2, 9, 3*) lays the burden on the lessee to prove unavoidable accident. In the analogous case of the contract of pledge, the same learned author says that the loss of the pledge by fire or robbery is considered as due to negligence, unless the defendant proves the contrary (*Bk. 3, 8, 4*, and compare *Van der Keesel, Thesis 540*). Voet (*Bk. 9, 2, 20; Simpson, p. 325*) takes the opposite view, on the ground that the onus lies by the general rule on the plaintiff, and that negligence, like fraud, will not be presumed. His reasoning is not without force, but in the conflict of authority I am disposed to follow the ruling of Withers J., who, in the case of *Bastian Pillai v. Gabriel*,[1] held that the onus lay upon defendant to prove that the destruction of the property hired by him was occasioned by unavoidable accident.

The defendants' evidence is that the first defendant (the husband) was out of the house at the time of the fire, and that the second defendant, his wife, was lying down ill after her recent confinement. The little girl mentioned by the District Judge was one of two little sisters of the first defendant, who were apparently regular inmates of his house. First defendant was said to have stated in the presence of the Vidane that his sister was cooking in a shed, and the fire spread from the hearth to the roof. The second defendant is said to have stated that the children had taken fire from the fireplace in the shed and they had accidentally fired the shed. The first defendant denied that his sister cooked at all, the servants did it for them; and no cooking was done in the shed, but in the kitchen. The second defendant was not called as a witness.

Upon the evidence I am of opinion that the defendants have not exculpated themselves by proving that the fire was due to an unavoidable accident. The decree appealed from must therefore be reversed, and plaintiff will have the costs of appeal and the costs in the Court below. Unless counsel can agree upon the amount of damages so as to avoid further expense, the case must go back for the assessment of damages in the District Court.

[1] *(1892) 1 S. C. R. 264.*

1908.
October 6.

WENDT J.

Upon delivery of this judgment counsel agree to Rs. 200, and plaintiff will have judgment accordingly with costs in both Courts.

GRENIER A.J.—

I was inclined to think at the argument of this appeal that the onus lay on the plaintiff, as he had distinctly averred that "the second defendant acted so carelessly and negligently and without taking due and proper care and precaution that the fire in a kitchen put up by the defendants without the authority of the plaintiff caught the roof thereof and burnt and destroyed and otherwise damaged the old dwelling-house". The plaintiff apparently took the onus on himself, but it was clearly impossible for him in the circumstances to prove how the fire originated. All he knew was that there was a fire which destroyed the roof of the building which he had hired to the defendant. Mr. Bawa for the appellant relied upon an admission made by the first defendant to the plaintiff in the presence of the Vidane that his sister was working in a shed which the defendant had constructed near the house attached to the verandah, and the fire had spread from the hearth to the roof. As the first defendant was admittedly not in the house at the time the fire occurred, he was evidently saying what was told him on his return by the other inmates of his house, presumably his wife and sister.

The District Judge has, more as a matter of surmise than as an actual finding on the evidence, stated that he believed the truth to be that a little girl, first defendant's sister, was carrying some fire about for some reason or other, the wind blew a spark on to the roof of the fence near the roof, and set fire to it. The origin of the fire was necessarily, therefore, unascertainable upon the evidence adduced in the Court below. The fire having, however, occurred, the onus was, I think, on the defendants to account for it, whether it was accidental or the work of an incendiary, if they desired to exculpate themselves. They were bound to take care of the property hired, in the same way as the owner would have taken care of it. As I understand, the Roman-Dutch Law and the authorities cited to us by counsel and referred to by my brother in his judgment, the question of onus is one which should be determined, not by any hard or fast rule, but according to the circumstances of each particular case. This, I think, is also in accordance with sound reason and common sense.

In my opinion, the onus in this case clearly lay on the defendants to account for the fire and the consequent destruction of plaintiff's property in such a way that no legal liability should attach to them. They have not discharged that onus, and I agree to the order proposed by my brother.

Appeal allowed.